



LIBRARY OF CONGRESS

Copyright Office

37 CFR Chapter II

[Docket No. 2019-7]

Online Publication

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notification of inquiry.

SUMMARY: The U.S. Copyright Office is undertaking an effort to provide additional guidance regarding the determination of a work's publication status for registration purposes. To aid this effort, the Office is seeking public input on this topic, including feedback regarding issues that require clarification generally, as well specific suggestions about how the Office may consider amending its regulations and, as appropriate, effectively advise Congress regarding possible changes to the Copyright Act. Based on this feedback, the Office may solicit further written comments and/or schedule public meetings before moving to a rulemaking process.

DATES: Initial written comments must be received no later than 11:59 p.m. Eastern Time on [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE **FEDERAL REGISTER**]. Written reply comments must be received no later than 11:59 p.m. Eastern Time on [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**].

ADDRESSES: For reasons of government efficiency, the Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through

regulations.gov. Specific instructions for submitting comments are available on the Copyright Office website at <https://www.copyright.gov/rulemaking/online-publication/>. If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office, using the contact information below, for special instructions.

FOR FURTHER INFORMATION CONTACT: Regan A. Smith, General Counsel and Associate Register of Copyrights, regans@copyright.gov; Robert J. Kasunic, Associate Register of Copyrights and Director of Registration Policy and Practice, rkas@copyright.gov; or Jordana S. Rubel, Assistant General Counsel, jrubel@copyright.gov. They can be reached by telephone at 202-707-3000.

SUPPLEMENTARY INFORMATION:

The Copyright Act requires an applicant for a copyright registration to state, among other things, whether a work has been published, along with the date and nation of its first publication. 17 U.S.C. 409(8). Over time, the Office has increasingly provided various group registration options that permit an applicant to register groups of works with one application and filing fee. *See, e.g.*, 37 CFR 202.3(b)(1)(iv), (b)(4) through (5), 202.4(c) through (i) and (k). Currently, however, no group registration option allows published and unpublished works to be registered using the same application. As a result, applicants must determine the publication status of a work or group of works in order to complete a proper copyright application.

This requirement places some burden on copyright applicants. Although the Office may provide some general guidelines on relevant legal requirements,¹ it cannot give specific legal advice as to whether a particular work has been published. U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* sec. 1904.1 (3d ed. 2017) (“*Compendium (Third)*”). Thus, the applicant must determine independently, or potentially based on the advice of its own legal counsel, whether a work is published. Various individuals and groups have repeatedly expressed frustration to the Office regarding difficulty in determining whether a work has been published when completing copyright application forms.² Commenters to the Office have indicated that the distinction between published and unpublished works is “so complex and divergent from an intuitive and colloquial understanding of the terms that it serves as a barrier to registration, especially with respect to works that are disseminated online.”³ A perceived lack of consensus among courts about what constitutes online publication only increases applicants’ uncertainty, as applicants, most of whom have no legal training, may feel

¹ For example, the Copyright Office provides guidelines on legal requirements such as publication in its *Compendium of U.S. Copyright Office Practices* and in various Circulars.

² See, e.g., National Press Photographers Association (“NPPA”), Comments Submitted in Response to Public Draft of *Compendium of U.S. Copyright Office Practices* at 7-11 (May 31, 2019) (“We continue to find that our members are confused by the definition of published vs. unpublished.”); Coalition of Visual Artists (“CVA”), Comments Submitted in Response to Notice of Inquiry Regarding Registration Modernization, at 35 (Jan. 15, 2019) (“No issue frustrates and confounds visual creators more than the statutory requirement that the registration application include whether an applicant’s works have been published, and if published, the date and nation of first publication.”); Professional Photographers of America (“PPA”), Comments Submitted in Response to the U.S. Copyright Office’s Apr. 24, 2015 Notice of Inquiry at 7 (July 22, 2015); American Society of Media Photographers (“ASMP”), Comments Submitted in Response to the U.S. Copyright Office’s Apr. 24, 2015 Notice of Inquiry at 13 (July 23, 2015) (noting that “[t]he most vocal complaint about the current system is the time-consuming and expensive process of distinguishing between published and unpublished works in the registration process”).

³ Copyright Alliance, Comments Submitted in Response to Notice of Inquiry Regarding Registration Modernization, at 5 (Jan. 15, 2019).

bound to reconcile conflicting judicial opinions before they can file an application to register their copyrights.⁴

Based on these comments, and recognizing a relative lack of consensus among courts, the Office believes that additional guidance regarding the definition of publication in the modern context will help ensure the smooth functioning of the registration process. As noted, the requirement to designate the publication status of works on registration applications is currently mandated by statute, and the Copyright Act includes a definition of “publication.” However, the Office may act under its existing regulatory authority to determine how to apply this statutory definition of publication for purposes of administering the copyright registration system; and the Office may also provide guidance materials to users of that system. Depending on the public comments received in response to this inquiry, the Office may also choose to provide recommendations to Congress on specific statutory language to further clarify this issue. This inquiry is directed at the current statute and the existing structure of the copyright registration system; any legislative changes to the Copyright Act could affect the subjects of inquiry and the topics on which users of the copyright registration system would require guidance.

The Office is issuing this Notice of Inquiry to seek public comments regarding possible areas of consensus, and may subsequently notice a proposed rule to codify guidance it develops regarding the definition of publication as a result of this process.⁵

⁴ See, e.g., CVA, Comments Submitted in Response to Notice of Inquiry Regarding Registration Modernization, at 35 (Jan. 15, 2019) (citing *Elliott v. Gouverneur Tribune Press, Inc.*, 2014 WL 12598275, at *3 (N.D.N.Y. Sept. 29, 2014) to highlight conflicting opinions on the question of whether publication on the internet constitutes “publication” for the purposes of registering images as published or unpublished; providing an Appendix of frequently asked questions of the CVA that relate to publication).

I. Background

A) Statutory and Regulatory Usage of “Publication”

The Copyright Act defines publication as “the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending.” 17 U.S.C. 101. Publication includes the actual distribution of such copies or phonorecords or the offer to distribute such copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, however a “public performance or display of a work does not of itself constitute publication.” *Id.* While the definition of “publication” may have provided sufficient clarity when the Copyright Act was enacted in 1976, adapting this definition to the modern electronic era has proven challenging. Congress could not have anticipated the technological changes in the ensuing four decades that have enabled copyright owners to make copies of their works accessible to the general public worldwide with a single keystroke.⁶

1) Published versus Unpublished Works

⁵ The Office previously indicated this notice was forthcoming in various public documents. Letter from Karyn A. Temple, Acting Register of Copyrights and Dir., U.S. Copyright Office to Lindsey Graham, Chairman, Comm. on the Judiciary, U.S. Senate, and Dianne Feinstein, Ranking Member, Comm. on the Judiciary, U.S. Senate (Jan. 18, 2019) at 11, <https://www.copyright.gov/policy/visualworks/senate-letter.pdf>; Letter from Karyn A. Temple, Acting Register of Copyrights and Dir., U.S. Copyright Office to Jerrold Nadler, Chairman, Comm. on the Judiciary, U.S. House of Representatives, and Doug Collins, Ranking Member, Comm. on the Judiciary, U.S. House of Representatives (Jan. 18, 2019) at 11, <https://www.copyright.gov/policy/visualworks/house-letter.pdf>; 84 FR 3693, 3696 (Feb. 13, 2019); Letter from Karyn A. Temple, Acting Register of Copyrights and Dir., U.S. Copyright Office to Thom Tillis, Chairman, Subcomm. on Intellectual Property, U.S. Senate, and Christopher A. Coons, Ranking Member, Subcomm. on Intellectual Property, U.S. Senate (May 31, 2019) at 41-42, <https://www.copyright.gov/laws/hearings/response-to-march-14-2019-senate-letter.pdf>; Letter from Karyn A. Temple, Acting Register of Copyrights and Dir., U.S. Copyright Office to Jerrold Nadler, Chairman, Comm. on the Judiciary, U.S. House of Representatives, and Doug Collins, Ranking Member, Comm. on the Judiciary, U.S. House of Representatives (May 31, 2019) at 41-42, <https://www.copyright.gov/laws/hearings/response-to-april-3-2019-house-letter.pdf>.

⁶ The Digital Millennium Copyright Act did not amend the definition of “publication” or otherwise comment on online publication. Pub. L. 105-304, 112 Stat. 2860 (1998).

Applying the statutory definition of “publication” to works that have been posted online is particularly important because publication is a central concept in copyright law from which many significant legal consequences flow:⁷

- (1) Whether a work is published and, if so, the date of first publication can have far-reaching consequences for a work. For example, registration of a work before publication or within five years of first publication constitutes *prima facie* evidence of the validity of the copyright and the facts stated on the certificate. 17 U.S.C. 410(c).⁸
- (2) A copyright owner is generally eligible to recover attorneys’ fees and statutory damages, rather than having to prove actual damages or entitlement to defendant’s profits, only if it has registered its copyright before the alleged infringement commenced. Congress provided an exception to this rule in the form of a three month grace period for published works, allowing copyright owners to recover attorneys’ fees and statutory damages for pre-registration infringement when registration is made within three months of first publication. 17 U.S.C. 412.⁹
- (3) Although omission of a copyright notice from published copies of a work on or after March 1, 1989 no longer results in copyright forfeiture, a

⁷ Under the 1909 Copyright Act, state copyright law generally governed protection for unpublished works. Copyright owners could secure federal copyright protection for certain types of unpublished works by registering them with the Copyright Office, and federal copyright law also applied if the work was published with a notice of copyright. Copyright Act of 1909, ch. 320, sec. 9, 35 Stat. 1075, 1077 (repealed 1976). Publication of a work without the requisite formalities resulted in the loss of copyright protection. Under the 1976 Act, federal copyright law governs all original works fixed in a tangible medium of expression whether they are published or not. 17 U.S.C. 102(a).

⁸ A court may exercise its discretion to determine how much evidentiary weight to accord to a work not registered within five years of first publication.

⁹ Exceptions to this rule apply for authors claiming violations of their moral rights and for infringement actions involving preregistered works. *See* 17 U.S.C. 408(f), 412.

defendant who had access to a copy of the work that includes a copyright notice cannot typically claim that any infringement of that work was innocent. 17 U.S.C. 401(d).

- (4) The term of copyright for works made for hire, anonymous works, and pseudonymous works is the shorter of ninety-five years from the date of publication or one hundred twenty years from the date of creation. 17 U.S.C. 302(c).
- (5) Authors or their heirs have a right to terminate transfers of copyright that cover the right of publication and were effected after January 1, 1978 during a five-year period that begins at the earlier of thirty-five years from the date of first publication or forty years from the date of the transfer. 17 U.S.C. 203(a)(3).
- (6) One factor in the fair use analysis is the “nature of the work,” which contemplates, in part, whether the work had previously been published, with the scope of fair use being narrower with respect to unpublished works in recognition of an author’s right to control the date of first publication. 17 U.S.C. 107.¹⁰

2) Location of Publication

The locations in which a work has been published can also have important legal consequences with respect to copyright issues. First, a work’s eligibility for copyright protection under U.S. law may depend in part on whether it is published and, if so, the country of first publication. Unpublished works that are original works of authorship

¹⁰ See, e.g., *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985) (holding that publication of excerpts from unreleased manuscript was not fair use).

fixed in a tangible medium of expression are eligible for U.S. copyright protection, regardless of the author's nationality or domicile or where the work was created. 17 U.S.C. 102(a), 104(a). In contrast, published original works of authorship are only subject to U.S. copyright law under certain circumstances.¹¹ 17 U.S.C. 104(b).

Second, and separate from whether a work is eligible for copyright protection under U.S. law, before a copyright owner can commence an action for infringement of a United States work, the Copyright Office must either register the claim to copyright or else refuse to register the claim. 17 U.S.C. 411(a); *Fourth Estate Public Benefit Corp. v. Wall-Street.com*, 586 U.S. —, 203 L.Ed. 2d 147 (2019). Therefore, access to court may depend on whether a work is considered a United States work or a foreign work, and publication is a key concept in making that determination. *See, e.g., UAB "Planner5D" v. Facebook, Inc.*, 2019 WL 6219223 (N.D. Cal. Nov. 21, 2019) (dismissing copyright infringement claims where plaintiff failed to allege adequately that its work was a registered United States work or exempted from registration requirement as a foreign work). An unpublished work is a United States work if all of the authors of the work are nationals, domiciliaries, or habitual residents of the United States. 17 U.S.C. 101 (definition of "United States work"). Whether a published work is a United States work, however, depends largely on the country in which the work was first published. *Id.*¹²

¹¹ Such circumstances include: (1) if one or more of the authors is a national or domiciliary of the United States or a country that is a party to a copyright treaty to which the United States is a party (a "treaty party"), (2) if the work is first published in the United States or in a foreign nation that is a treaty party, or (3) if within 30 days after first publication in a non-treaty party, the work is published in the United States or in a foreign nation that is a treaty party. 17 U.S.C. 104(b).

¹² Specifically, a published work is considered a U.S. work if it was first published (i) in the United States; (ii) simultaneously in the United States and a treaty party whose law grants a term of copyrighted protection that is not shorter than the term provided under U.S. law; (iii) simultaneously in the United States and a foreign nation that is not a treaty party; or (iv) in a foreign nation that is not a treaty party and

Third, whether a work is published and the country of first publication also influence whether a work whose copyright was lost due to lack of compliance with formalities or lack of national eligibility may be eligible for restoration under U.S. law. *See* 17 U.S.C. 104A.

Fourth, a copyright owner must deposit two copies of most works that are published in the United States with the Library of Congress, but this obligation does not attach to non-U.S. works or unpublished works. 17 U.S.C. 407(a)-(b).¹³

3) Treatment of Publication Status in the Copyright Registration Process

As noted, the Copyright Act requires an applicant for a copyright registration to state, among other things, whether a work has been published, along with the date and nation of its first publication. 17 U.S.C. 409(8). While the Register has regulatory authority to modify certain registration requirements, *compare* 17 U.S.C. 407(c) (permitting Register to exempt certain categories of material from statutory deposit requirements), the Office may not waive this statutory requirement under section 409(8). The Copyright Act also requires the Register of Copyrights to create a group registration option for works by the same individual author that are first published as contributions to periodicals within a twelve month period, in connection with which applicants are required to identify each work and its date of first publication. 17 U.S.C. 408(c)(2).¹⁴

Other copyright regulations relating to the registration process also require applicants to determine whether a work or group of works has been published. For

all of the authors of the work are nationals, domiciliaries or habitual residents of the United States. 17 U.S.C. 101 (definition of “United States work”).

¹³ Works published in the United States that are available only online are generally exempted by regulation from the mandatory deposit requirements of section 407(a).

¹⁴ The regulations that were subsequently established for this group option can be found at 37 CFR 202.4(g).

example, groups of up to 750 *unpublished* photographs created by the same author for whom the copyright claimant is the same can be registered with one application and filing fee. 37 CFR 202.4(h). Similarly, groups of up to 750 *published* photographs created by the same author and for whom the copyright claimant is the same can be registered with one application and filing fee. 37 CFR 202.4(i). Due to the technical constraints of the Office's current registration system and the statutory requirement of section 409(8), there is no group registration option that allows published and unpublished photographs to be registered together within the same application. Similarly, groups of up to ten unpublished works in certain categories may be registered with one application and filing fee if the author and claimant information is the same for all of the works. 37 CFR 202.4(c). And a group of serials or newspaper issues that are all-new collective works that were not published prior to the publication of that issue may be registered with one application under certain circumstances. 37 CFR 202.4(d) through (e). Like photographs, there are currently no methods for registering published and unpublished works in these categories in one group application.

A recent Ninth Circuit case illustrates the consequences an applicant may face if it incorrectly indicates on an application for a copyright registration that the work at issue is unpublished. In *Gold Value International Textile, Inc. v. Sanctuary Clothing, LLC*, 925 F.3d 1140 (9th Cir. 2019), the court affirmed the district court's finding that a copyright registration was invalid with respect to the work at issue where the application stated the work was unpublished despite the applicant's knowledge at the time of facts that the court determined constituted publication. Unlike other cases in which the Register has responded to requests pursuant to 17 U.S.C. 411(b), a supplementary registration could

not have corrected the error in this case because the registration at issue covered a collection of unpublished works, and a published work could not be registered as part of an unpublished collection.¹⁵ *Id.* at 1148. The court affirmed dismissal of the complaint based on the lack of a valid registration, as well as the award of over \$120,000 in attorneys’ fees to defendants as the prevailing parties. *Id.* at 1148-49.

B) The Meaning of “Publication”

1) Legislative History

The 1976 Copyright Act House Report notes that, although publication would play a less central role in copyright law under the 1976 Act than it had under the 1909 Act, “the concept would still have substantial significance under provisions throughout the bill....” H.R. Rep. No. 94-1476, at 138 (1976). The legislative history of the 1976 Copyright Act also provides guidance regarding Congress’ interpretation of the statutory definition of the term “publication.” The 1976 Copyright Act House Report explains that under the definition included in the Act, a work would be considered published if “one or more copies or phonorecords embodying it are distributed to the public—that is generally to persons under no explicit or implicit restrictions with respect to disclosure of its contents—without regard to the manner in which the copies or phonorecords changed hands.” H.R. Rep. No. 94-1476, at 138 (1976).¹⁶ The House Report also explains that the distinction between the public distribution of a work, which constitutes publication, and the performance or display of a work, which does not constitute publication, is based

¹⁵ The option to register a collection of unpublished works was subsequently discontinued and replaced by a group registration option for unpublished works, which allows registration of up to ten unpublished works in the same administrative class created by the same author or authors, who must also be the copyright claimants, and for which the authorship statement for each author is the same. *See* 37 CFR 202.4(c).

¹⁶ *See also* H.R. Rep. No. 94-1476, at 61 (1976) (noting that “[t]he reference to ‘copies or phonorecords,’ although in the plural, are intended here and throughout the bill to include the singular”).

upon whether a material object would change hands. *Id.* (referencing definition of “publication” in 17 U.S.C. 101). The definition of “publication” was intended to clarify that “any form of dissemination in which a material object does not change hands—performances or displays on television, for example—is not a publication no matter how many people are exposed to the work.”¹⁷ *Id.*

The House Report also notes that Congress provided the right “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending” as one of the exclusive rights of a copyright owner in section 106 of the Copyright Act. *Id.* at 62 (referencing 17 U.S.C. 106(3)). The Report describes this exclusive right as “the right to control the first public distribution of an authorized copy or phonorecord of his work” and explains that any unauthorized public distribution of copies would be an infringement. *Id.*

2) Case Law: Electronic Works

It is well-settled that electronic files are capable of being published as defined by the Copyright Act. To the extent that publication requires transferring or offering to transfer a material object, electronic files saved on a server, hard drive or disk constitute material objects, such that they meet the “copies” requirement inherent in the definition of publication. Courts have routinely found that electronic transmission of a work constitutes distribution.¹⁸ Because the Copyright Act defines publication to include the

¹⁷ This language distinguished distribution and publication (which allow for possession of a copy of a work) from performance or display (which allow only for a work to be perceived). It does not reflect a requirement that an “actual” distribution of a work occur to constitute publication.

¹⁸ See, e.g., *New York Times Co. v. Tasini*, 533 U.S. 483 (2001) (stating that placement of electronic copies of articles in a database constituted distribution of copies of those articles as defined by the Copyright Act); *Metro-Goldwyn-Mayer v. Grokster*, 545 U.S. 913 (2005) (noting that “peer-to-peer networks are employed to store and distribute electronic files” and that peer-to-peer software “enable[d] users to reproduce and distribute the copyrighted works in violation of the Copyright Act.”); *London-Sire Records*,

distribution of copies or phonorecords to the public, it follows that the electronic transmission of copies of a work constitutes publication of that work if the other requirements of publication were satisfied.

Judicial opinions addressing the definition of publication in the online context are not uniform. Some courts have held that merely posting a work on a publicly accessible website constitutes publication. For example, in *Getaped.com, Inc. v. Cangemi*, 188 F. Supp. 2d 398, 402 (S.D.N.Y. 2002), the court held that the posting of content on a website constituted publication because “merely by accessing a webpage, an Internet user acquires the ability to make a copy of that webpage, a copy that is, in fact, indistinguishable in every part from the original. Consequently, when a website goes live, the creator loses the ability to control either duplication or further distribution of his or her work.” The court reasoned that unlike a public display or performance, the public has the ability to download a file from a website and gain a possessory interest in it. *Id.* at 401-02. Other courts have adopted *Getaped*’s holding that the act of posting a work to a website constitutes publication.¹⁹ These courts have not addressed, however, whether a rule that bases publication solely on the technical ability of users to duplicate or further distribute a work posted on the internet is inconsistent with the established principle that publication requires the copyright owner’s authorization. *See Compendium (Third)* sec. 1902. Indeed, copying or distributing such a work without the copyright owner’s

Inc. v. Doe I, 542 F. Supp. 2d 153, 170–72 (D. Mass. 2008) (“[a]n electronic file transfer is plainly within the sort of transaction that § 106(3) [the distribution right] was intended to reach.”).

¹⁹ *See, e.g., UAB “Planner5D” v. Facebook, Inc.*, 2019 WL 6219223, at *7 (N.D. Cal. Nov. 21, 2019) (holding that plaintiff failed to plead adequately that works posted on a website were merely displayed and therefore unpublished where it had not alleged facts that show that the website contained features that prevented users from copying the works); *New Show Studios, LLC v. Needle*, 2016 WL 5213903, at *7 (C.D. Cal. Sept. 20, 2016); *William Wade Waller Co. v. Nexstar Broad., Inc.*, 2011 WL 2648584, at *2 (E.D. Ark. July 6, 2011).

permission would (absent a defense) constitute infringement – a result that is difficult to reconcile with the notion that the copyright owner published the work merely by posting it online.²⁰

In contrast, other courts have taken the position that merely posting a digital file on the internet does not constitute publication. For example, in *Einhorn v. Mergatroyd Productions*, the court held that posting a digital file of a performance of a theatrical production on the internet did not amount to publication because it did not involve a transfer of ownership, rental, lease or lending. 426 F. Supp. 2d 189, 197 (S.D.N.Y. 2006). Another court in the same district held that allegations that a collection of drawings were posted on a website were insufficient to plead that the drawings were published under the Copyright Act. *McLaren v. Chico's FAS, Inc.*, 2010 WL 4615772, at *4 (S.D.N.Y. Nov. 9, 2010). Likewise, in *Moberg v. 33T, LLC*, the court determined that a Swedish photographer's posting of copyrighted works on a German website did not constitute simultaneous, global publication as a matter of law and the work could not be considered a "United States work" that was subject to the registration requirement of section 411(a) prior to filing suit. 666 F. Supp. 2d 415, 422 (D. Del. 2009). The court reasoned that treating the uploading of a work on a website to be simultaneous publication in every jurisdiction in which the website is accessible would effectively subject copyright owners from other countries to the formalities of U.S. copyright law, contrary to the purpose of the Berne Convention. *Id.* at 422-23.

Rather than endorsing a bright line test, the Eleventh Circuit, the only Circuit Court to rule specifically on the issue, opined that publication is a fact-specific inquiry. In

²⁰ Modern technology may also prevent users' practical ability to make copies of certain webpages. *See* 17 U.S.C. 1201(a).

Kernal Records Oy v. Mosley, the court held that determining whether a work has been published requires an examination of “the method, extent, and purpose of the alleged distribution,” and determining whether a work was first published outside the United States requires an examination of “both the timing and geographic extent of the first publication.” 694 F.3d 1294, 1304 (11th Cir. 2012). The court explained that a copyright owner can make a work available “online” in many ways, including by sending the work to specific recipients through email, as well as posting it on a restricted website, a peer-to-peer network, or a public website, and each of the methods raises different wrinkles as to whether the work has been published. *Id.* at 1305. Because the evidence presented by the defendant established only that the work had been posted in an “internet publication” and an “online magazine,” from which it was not evident that the work had been made available on a public website or that it had been simultaneously published in Australia and the United States, disputed issues of fact prevented summary judgment as to whether the work was a “United States work.” *Id.* at 1306-07. Similarly, in *Rogers v. Better Business Bureau of Metropolitan Housing, Inc.*, the Southern District of Texas held that the fact intensive nature of the publication inquiry precluded the court from finding as a matter of law that the plaintiff distributed copies of the works at issue when he uploaded them to the internet. 887 F. Supp. 2d 722, 730 (S.D. Tex. 2012). “Absent binding law or even a clear consensus in case law directly related to the posting of a website online,” the court stated it was reluctant to find, as a matter of law, that the plaintiff distributed copies of the websites when he uploaded them to the internet, which was a determination it recognized “would have wide-ranging effects on the rights of authors and users,

including copyright duration, country of publication, time limits, deposit requirements with the Library of Congress, and fair use.” *Id.* at 731-32, n.34.

3) Copyright Office Guidance

The Copyright Office “will accept the applicant’s representation that website content is published or unpublished, unless that statement is implausible or is contradicted by information provided elsewhere in the registration materials or in the Office’s records or by information that is known to the registration specialist.”

Compendium (Third) sec. 1008.3(F). To aid applicants in determining whether a work has been published, the Copyright Office provides guidance on a variety of issues relating to the issue of publication based on the statutory definition and the Copyright Act’s legislative history. Consistent with the law, the Office does not consider a work to be published if it is merely displayed or performed online. *Compendium (Third)* sec. 1008.3(C). The *Compendium* provides that publication occurs when one or more copies or phonorecords are distributed to a member of the public who is not subject to any restrictions concerning the disclosure of the content of the work. *Compendium (Third)* sec. 1905.1. Consistent with the statutory definition, the *Compendium* provides that publication can be accomplished through transfer of ownership of the work or rental, lease, or lending of copies of the work, or by offering to distribute copies of a work to a group of persons for the purpose of further distribution, public performance or public display. *Compendium (Third)* sec. 1905.2, 1906.

The 1976 Copyright Act “recognized for the first time a distinct statutory right of first publication.” *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 552 (1985). This right allows the copyright owner to decide when, where and in what

form to first publish a work, or whether to publish it at all. *Id.* at 553; *see also*, H.R. Rep. No. 94-1476, at 61 (“The exclusive rights accorded to a copyright owner under section 106 are ‘to do and to authorize’ any of the activities specified in the five numbered clauses.”). Thus, the *Compendium* recognizes that publication only occurs if the distribution or offer to distribute copies is made “by or with the authority of the copyright owner.” *Compendium (Third)* sec. 1902. The Office therefore does not consider a work to be published if it is posted online without authorization from the copyright owner. *Compendium (Third)* sec. 1008.3(F).

The Office considers a work published if it is made available online and the copyright owner authorizes the end user to retain copies of that work. *Compendium (Third)* sec. 1008.3(B). “A critical element of publication is that the distribution of copies or phonorecords to the public must be authorized by the copyright owner. . . . To be considered published, the copyright owner must expressly or impliedly authorize users to make retainable copies or phonorecords of the work, whether by downloading, printing, or by other means.” *Compendium (Third)* sec. 1008.3(C). For instance, a work that is expressly authorized for download by members of the public by including a “Download Now” button, is considered published. *Compendium (Third)* sec. 1008.3(F). If the website on which a work is posted contains an obvious notice, including in the terms of service, indicating that a work cannot be downloaded, printed or copied, the work may be deemed unpublished. *Id.*

The Copyright Office also considers a work published if the owner makes copies available online and offers to distribute them to intermediaries for further distribution, public performance, or public display. *Compendium (Third)* sec. 1008.3(B); *see also*, H.R.

Rep. No. 94-1476, at 138 (“On the other hand, the definition also makes clear that, when copies or phonorecords are offered to a group of wholesalers, broadcasters, motion pictures, etc., publication takes place if the purpose is ‘further distribution, public performance, or public display.’”). For instance, a sound recording that has been offered by the copyright owner for distribution to multiple online streaming services and a photograph that has been offered by the copyright owner to multiple stock photo companies for purposes of further distribution would be considered published.

Compendium (Third) sec. 1008.3(B).

4) Commentary

Several copyright treatises opine on how to apply the statutory definition of publication to modern circumstances. David Nimmer explains that although the statutory definition of the term “publication” does not explicitly state that the copyright owner must authorize the distribution of the copies or phonorecords, such authorization can be implied because “Congress could not have intended that the various legal consequences of publication under the current Act would be triggered by the unauthorized act of an infringer or other stranger to the copyright.” David Nimmer & Melville Nimmer, *I Nimmer on Copyright* sec. 4.03 (2019). Nimmer does not take a definitive position on whether works that have been posted on the internet have been published—but asserts that this question must be considered within the context that the *sine qua non* of publication is allowing members of the public to acquire a possessory interest in tangible copies of a work. *Id.* at 4.07.

William Patry states that the Section 411(a) registration requirement raises “tricky questions” concerning first publication for works posted on the internet. William F. Patry,

3 *Patry on Copyright* sec. 6:55.40 (2019). Patry notes that the Berne Convention is non-self-executing, and that the Copyright Act does not define simultaneous publication; therefore, it is up to the courts to decide what “simultaneous publication” means, so long as their definition is consonant with the general definition of “publication” outlined in the Copyright Act. *Id.* Patry agrees with the general approach the Eleventh Circuit took in *Kernal Records* of focusing on the “particular factual distribution” as opposed to crafting a rule that “all ‘Internet’ publication is a global general publication.” *Id.*

In his treatise, Paul Goldstein argues that dissemination over the internet without limits on copying should be held to constitute publication. Paul Goldstein, *Goldstein on Copyright* sec. 3.3.3 (3d ed. 2016). Goldstein points to several reasons that counsel in favor of this result. First, because the copyright term for works made for hire is 95 years from publication, or 120 years from creation, to treat internet works as “unpublished” would effectively extend copyright protection for many internet works for an additional 25 years. *Id.* Second, considering internet works to be “unpublished” would dilute incentives to early and regular registration of claims to copyright. *Id.* Finally, one reason that Congress deemed broadcast performances or other traditional performances and displays not to constitute publication was that they could not be readily or accurately reproduced at the time when the 1976 Copyright Act was drafted. In contrast, a vast array and quantity of content can be cheaply and accurately downloaded from the internet. *Id.*

Others have opined on matters relating to publication. For example, Thomas F. Cotter recommends that Congress consider whether there is a different date, for example the date of creation, that may be preferable to trigger some or all of the consequences that currently flow from publication. Thomas F. Cotter, *Toward a Functional Definition of*

Publication in Copyright Law, 92 Minn. L. Rev. 1724, 1789 (2008). In the meantime, he suggests that courts apply a broad definition of publication to trigger time periods that begin to run on the date of first publication and for the purpose of a fair use analysis but a narrower definition of publication for imposing a duty to deposit and determining a work's country of origin and place of first publication. *Id.* at 1793.

C) Illustrative Challenges in Applying Statutory Definition to Modern Context

In the online environment, each new feature or application can raise additional wrinkles regarding publication. For example, the Office regularly receives questions regarding whether works that have been transmitted by email, link, and/or through streaming are distributions of a work that transfer ownership, such that they constitute publication, or are more closely akin to public performance or display of a work, which does not of itself constitute publication.

Consider the ubiquitous ability to post works on traditional websites or social media, such as posting a photograph to a Facebook page or Instagram account. Must the photographer actively demonstrate his/her authorization to copying, printing, downloading or further distribution of a work for the photograph to be considered published? Is an affirmative statement permitting users to copy, print, download or further distribute the work required for a work posted on a public website to be considered published, or can we infer consent of the author to these actions absent an explicit statement prohibiting copying, printing, downloading or distribution of the work? Similarly, does the posting of a work on a public website that assists users in some manner in downloading, printing, copying, or transmitting the work constitute publication, or can we infer from the posting of a work without any safeguards to prevent such actions

that the owner consents to these actions such that work is published? Is it sufficient for a copyright owner to have generally authorized the posting of the work on the public website or must the copyright owner have specifically authorized downloading, printing, copying and/or further distribution of the work?

Online Terms of Service also raise questions about whether a copyright owner has authorized copying, printing, downloading or distribution of its works. For example, does joining a social media platform whose terms of service provide that the social media platform or its users obtain a license to download, copy, print, and/or further distribute any content posted on the platform constitute authorization to other users to download, copy, print and/or redistribute any works subsequently posted on that platform? Where a social media platform provides tools for redistributing content (e.g. Twitter's "retweet" button, Facebook's "share" button, or Instagram's "add post to your story" button), have all members of that platform authorized the further distribution of works they post on that platform such that those works should be considered published?

The ability to transmit works widely with the click of a single button raises still other questions. If the posting of a work on a public website constitutes publication in certain circumstances, is the work simultaneously published in all jurisdictions from which the work is accessible? Does the concept of limited publication apply in the context of online publication? Is there a threshold number of people who must be able to access an online work for the work to be considered published? For example, is a work that is posted on a beta site that is being tested by a select group, or on a closed or private social media group published? How might a Facebook user's choice to allow only friends,

or friends of friends, or the general public to access materials posted on their profile affect the analysis of whether a posted work has been published?

II. Subjects of Inquiry

The Office invites written comments on the general subjects below. The Office seeks to propose a regulation interpreting the statutory definition of publication for registration purposes and to provide enhanced policy guidance, such as in revisions to the *Compendium* and/or Copyright Office circulars. Where possible, comments should be tailored to actions that are within the purview of the Office's regulatory authority, within the scope of the existing Copyright Act. If a party is proposing an action beyond the Office's authority, such as a statutory amendment or change to existing statutory language, the comment should explicitly so state. A party choosing to respond to this notice of inquiry need not address every subject, but the Office requests that responding parties clearly identify and separately address each subject for which a response is submitted. In responding, please identify your particular interest in and experience with these issues.

1. Section 409(8) of the Copyright Act requires applicants to indicate the date and nation of first publication if the work has been published. What type of regulatory guidance can the Copyright Office propose that would assist applicants in determining whether their works have been published and, if so, the date and nation of first publication for the purpose of completing copyright applications? In your response, consider how the statutory definition of publication applies in the context of digital on-

demand transmissions, streaming services, and downloads of copyrighted content, as well as more broadly in the digital and online environment.

2. Specifically, should the Copyright Office propose a regulatory amendment or provide further detailed guidance that would apply the statutory definition of publication to the online context for the purpose of guiding copyright applicants on issues such as:

- i. How a copyright owner demonstrates authorization for others to distribute or reproduce a work that is posted online;
- ii. The timing of publication when copies are distributed and/or displayed electronically;
- iii. Whether distributing works to a client under various conditions, including that redistribution is not authorized until a “final” version is approved, constitutes publication and the timing of such publication;
- iv. Whether advertising works online or on social media constitutes publication; and/or
- v. Any other issues raised in section I(C) above.

3. Can and should the Copyright Office promulgate a regulation to allow copyright applicants to satisfy the registration requirements of section 409 by indicating that a work has been published “online” and/or identifying the nation from which the work was posted online as the nation of first publication, without prejudice to any party subsequently making more

specific claims or arguments regarding the publication status or nation(s) in which a work was first published, including before a court of competent jurisdiction?²¹

4. Applicants cannot currently register published works and unpublished works in the same application. Should the Copyright Office alter its practices to allow applicants who pay a fee to amend or supplement applications to partition the application into published and unpublished sections if a work (or group of works) the applicant mistakenly represented was either entirely published or unpublished in an initial application is subsequently determined to contain both published and unpublished components? What practical or administrative considerations should the Office take into account in considering this option?
5. For certain group registration options, should the Copyright Office amend its regulations to allow applicants in its next generation registration system to register unpublished and published works in a single registration, with published works marked as published and the date and nation of first publication noted? What would the benefits of such a registration option be, given that applicants will continue to be required to determine whether each work has been published prior to submitting an application? What practical or administrative considerations should the Office take into account in considering this option?

²¹ Compare 37 CFR 201.4(g) (“The fact that the Office has recorded a document is not a determination by the Office of the document’s validity or legal effect. Recordation of a document by the Copyright Office is without prejudice to any party claiming that the legal or formal requirements for recordation have not been met, including before a court of competent jurisdiction.”).

7. Is there a need to amend section 409 so that applicants for copyright registrations are no longer required to identify whether a work has been published and/or the date and nation of first publication, or to provide the Register of Copyrights with regulatory authority to alter section 409(8)'s requirement for certain classes of works?
8. Is there a need for Congress to take additional steps with respect to clarifying the definition of publication in the digital environment? Why or why not? For example, should Congress consider amending the Copyright Act so that a different event, rather than publication, triggers some or all of the consequences that currently flow from a work's publication? If so, how and through what provisions?
9. The Copyright Office invites comment on any additional considerations it should take into account relating to online publication.

Dated: November 26, 2019.

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